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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SEAN TELLY ESQUIVEL, Defendant and Appellant.	H029358 (Monterey County Super. Ct. Nos. SS051013, SS051155)

In exchange for dismissal of other charges and enhancements and a sentencing lid of 11 years and four months, defendant Sean Telly Esquivel pleaded guilty or no contest to (1) failing to register as a sex offender, (2) possessing child pornography, and (3) receiving stolen property. He also admitted that he had (1) committed the latter two offenses while out on bail, and (2) served two prior prison terms. The trial court sentenced defendant to the maximum term permitted under the plea agreement, which involved the use of a six-year upper term for the pornography conviction. Defendant thereafter filed a notice of appeal in which he appeals "on grounds that arose after entry of the pleas and does not affect the validity of the plea[s]." He did not seek, nor was he granted, a certificate of probable cause. (Pen. Code, § 1237.5.)[1] The ultimate issue raised on appeal relates to the trial court's authority to impose an upper term sentence in light of *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*). This argument is not

[1] Further unspecified statutory references are to the Penal Code.

cognizable on appeal because defendant did not obtain a certificate of probable cause. We therefore dismiss the appeal.

BACKGROUND

Defendant signed change of plea forms (the pleas stemmed from two informations) that denoted a maximum sentence of 11 years, four months. In reciting the terms of the agreement at the change-of-plea hearing, the trial court stated that, "Maximum penalty that could be imposed is up to 11 years, 4 months in state prison, followed by a minimum of three years on parole. [¶] Do you understand that?" Defendant responded, "Yes." During further colloquy with defendant, the trial court reiterated, "The understanding is that you would be going to prison. You would not receive probation. And the range is . . . Seven years, 4 months to 11 years, 4 months." It continued: "All right. So that's the understanding then. The Court has indicated it's going to lean towards the 7 years, 4 months. If the Court does something different from that, then you can't withdraw your plea. The maximum penalty could be 11 years, 4 months." Defendant responded, "Okay." The trial court added: "You understand that?" Defendant responded, "Yeah." At the sentencing hearing, defense counsel asked the court to impose a midterm sentence, which would calculate to the minimum seven-year, four-month term, rather than the upper term recommended by the prosecution, which would calculate to the 11-year, four-month term. Defense counsel did not, however, argue that the trial court did not have the authority to impose an upper term sentence absent jury findings that one or more aggravating factors existed. (*Blakely*, *supra*, 542 U.S. 296.)[2]

[2] The Supreme Court decided *Blakely* on June 24, 2004. The negotiated disposition in this case took place on June 2, 2005, and sentencing happened on September 1, 2005.

DISCUSSION

Section 1237.5 provides, "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

We are required to strictly apply the certificate requirements of section 1237.5. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1097 [holding that "section 1237.5 . . . ha[s] been applied in a strict manner," and condemning relaxed application of section 1237.5's requirements despite argument that defendant denied relief on direct appeal will seek same relief by petitioning for a writ of habeas corpus]; *People v. Panizzon* (1996) 13 Cal.4th 68, 89, fn. 15 (*Panizzon*) ["condemn[ing]" the practice of addressing the merits of contentions despite failure to comply with section 1237.5, because "the purposes behind section 1237.5 will remain vital only if appellate courts insist on compliance with its procedures"].) As noted in *People v. Cole* (2001) 88 Cal.App.4th 850, 860, footnote 3, "strict application of section 1237.5 works no undue hardship on defendants with potentially meritorious appeals. The showing required to obtain a certificate is not stringent. Rather, the test applied by the trial court is simply 'whether the appeal is clearly frivolous and vexatious or whether it involves an honest difference of opinion.' "

An exception to the certificate requirement exists for challenges to " 'issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.' " (*People v. Shelton* (2006) 37 Cal.4th 759, 766 (*Shelton*).) However, this exception will only apply if the challenge on appeal is not "*in substance* a challenge to the validity of the plea." (*Panizzon*, *supra,* 13 Cal.4th at p. 76; see, e.g., *Shelton*, *supra*, 37 Cal.4th at p. 766 [sentence challenge based

on section 654's prohibition against multiple punishment is a challenge that affects validity of plea].)

" '[A] challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself' and thus requires a certificate of probable cause." (*Shelton, supra*, 37 Cal.4th at p. 766, quoting *Panizzon, supra*, 13 Cal.4th at p. 79.) "[T]he specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term." (*Shelton, supra*, 37 Cal.4th at p. 768.) "[A] provision recognizing the defendant's right to 'argue for a lesser term' is generally understood to mean only that the defendant may urge the trial court to exercise its sentencing discretion in favor of imposing a punishment that is less severe than the maximum punishment authorized by law." (*Ibid.*) "Of course, a prosecutor and a defendant may enter into a negotiated disposition that expressly recognizes a dispute or uncertainty about the trial court's authority to impose a specified maximum sentence--because of Penal Code section 654's multiple punishment prohibition or for some other reason--and preserves the defendant's right to raise that issue at sentencing and on appeal." (*Shelton, supra*, 37 Cal.4th at p. 769.) To the extent some ambiguity exists regarding the meaning of the parties' agreement, a court should "begin with the language of the plea agreement concerning sentencing, as the trial court recited it on the record" (*id.* at p. 767), since "[a] negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*Ibid.*)

People v. Bobbit (2006) 138 Cal.App.4th 445, is directly on point. There, the defendant appealed after he was sentenced to the maximum term permitted under his plea agreement. The plea agreement failed to preserve, either at sentencing or for appeal, the issue that the trial court did not have the authority to impose an upper term sentence in

the absence of a jury finding of one or more of the aggravating circumstances. The defendant, however, had failed to obtain a certificate of probable cause. The court concluded: "On this record, we conclude as a matter of law that the plea agreement did not preserve, either at sentencing or on appeal, the issue that the court did not have the authority to impose an upper term sentence in the absence of a jury finding of one or more aggravating circumstance(s). Without a certificate of probable cause, the appeal must be dismissed." (*Id.* at p. 448, fn. omitted.)

Defendant disagrees with *Bobbit* and contends that his appeal is not prohibited under *Shelton* because he is not making the argument that the trial court lacked sentencing authority to impose the lid sentence. Instead, defendant urges that he is arguing that "before the [trial] court imposes the higher sentence it must comply with constitutional prerequisites."

We agree with defendant that his contention is distinguishable from the defendant's contention in *Shelton*. But we nevertheless conclude that the analytical framework announced in *Shelton* requires dismissal of defendant's appeal. First, by urging that the trial court failed to comply with constitutional prerequisites, defendant is necessarily urging that the trial court could not lawfully impose the challenged sentence rather than that it abused its discretion in making one lawful sentence choice instead of another lawful sentence choice. And second, the application of "general contract principles" to defendant's negotiated plea reveals that his plea agreement embodies a mutual understanding that the upper term could lawfully be applied. (*Shelton*, *supra*, 37 Cal.4th at pp. 767-768.) Consequently, defendant's appellate contention is, in substance, a challenge to his negotiated plea and requires a certificate of probable cause.

DISPOSITION

The appeal is dismissed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.